

No. PD-1066-17

In the
TEXAS COURT OF CRIMINAL APPEALS
Austin, Texas

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

STATE OF TEXAS,
Appellant-Petitioner
v.

DAI'VONTE E'SHAUN TITUS ROSS,
Appellee-Respondent

On the State's petition for discretionary review from
The Fourth Court of Appeals, San Antonio, Texas

Appellate Cause No. 04-16-00821-CR

Tried in the County Court at Law No. 15, Bexar County, Texas

Trial Cause No. 519657

State's Brief on the Merits on Discretionary Review

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THE HONORABLE SANDEE BRYAN MARION, *Chief Justice*
THE HONORABLE REBECA C. MARTINEZ, *Justice*
THE HONORABLE IRENE RIOS, *Justice and author of the opinion*

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STATEMENT OF THE CASE

Proceedings in the Trial Court

The State charged Dai’Vonte E’Shaun Titus Ross by complaint and information with intentionally or knowingly displaying a firearm in a public place in a manner calculated to alarm (C.R. at 7, 8). *See* TEX. PENAL CODE § 42.01(a)(8). The State appealed the trial court’s order granting Appellee’s motion to quash the information for lack of notice (C.R. at 66–69, 81).

Proceedings in the Court of Appeals

In a published opinion, the court of appeal affirmed the trial court’s order on August 2, 2017. *State v. Ross*, 531 S.W.3d 878 (Tex. App.—San Antonio 2017, pet. granted). On September 1, 2017, the court of appeals denied the State’s motion for rehearing.

Proceedings in this Court

This Court granted the State’s petition for discretionary review on January 24, 2018. The State’s Brief is due on March 12, 2018.

GROUND FOR REVIEW

- Ground One:** Does an information that tracks the language of section 42.01(a)(8) provide a defendant with sufficient notice that he displayed a firearm in a manner calculated to alarm?
- Ground Two:** Did the court of appeals err by applying a First Amendment and Fourteenth Amendment rule to a Sixth Amendment complaint?
- Ground Three:** Is the term “alarm” within the context of section 42.01(a)(8) inherently vague?

STATEMENT OF FACTS

Ross was charged by information for intentionally or knowingly displaying a firearm in a manner calculated to alarm in a public place at the 300 block of Ferris Avenue in Bexar County, Texas (C.R. at 7). TEX. PENAL CODE § 42.01(a)(8). In a pretrial motion based on the Sixth Amendment and analogous rules in the Code of Criminal Procedure, Ross asked the trial court to quash the information for lack of notice (C.R. at 66–69). The State argued that the information was sufficient because it tracked the language of the statute and that the additional language requested by Appellee was evidentiary in nature (R.R. at 7).

The primary concern expressed by Ross during the hearing was that “the legislature has largely allowed this type of conduct” (R.R. at 4). Ross’s trial counsel went on to say,

In an open-carry state at what point is it now a manner calculated to alarm? I can think of hypos where -- I don’t know -- someone hypothetically taking a gun from a store to his car. Is it displaying it out in public? It’s just not -- is it the way the guy is wearing it? Is it the way he’s pointing it or where he’s pointing it?

(R.R. at 9–10).

The trial court granted the motion, noting that section 42.01(a)(8) “seems to be a little vague in and of itself” (C.R. at 10–11). The Fourth Court of appeals affirmed that ruling.

SUMMARY OF THE ARGUMENT

Ross sought relief in the trial court claiming the State’s information alleging a violation of Texas Penal Code section 42.01(a)(8) did not give adequate notice of the charges against him. Specifically, Ross complained that the information did not sufficiently allege the “manner calculated to alarm.” Though Ross’s complaint was based on the Sixth Amendment, the court of appeals relied on precedent where this Court held that the term “alarm” is vague in the context free speech. Based on this precedent, the court of appeals concluded that conduct that alarms some people might not alarm others. This conclusion, however, is inapplicable to the present case because this statute neither implicates free speech nor does it require that a person actually be alarmed by the display of a firearm. Additionally, the precedent relied on by the court of appeals does not govern the Sixth Amendment right to notice. Consequently, the answers to the grounds presented in the State’s petition are “yes,” “yes,” and “no.”

ARGUMENT

In the first ground, the State asks this Court to conclude that the information tracking the language of the statute gave Appellee sufficient Sixth Amendment notice of the nature of the accusation that he displayed a firearm in a manner calculated to alarm. In ground two the State asks this Court to disavow the court of appeals reliance on First Amendment precedent to resolve this appeal. In the third ground, the State asks this Court to reverse the court of appeals’ conclusion that the term “alarm” is “inherently vague” in the context of the disorderly conduct statute.

Standard of Review: De Novo

The sufficiency of an indictment is a question of law and reviewed de novo on appeal. *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004).

Penal Code, Section 42.01(a)(8)

A person is guilty of disorderly conduct if he intentionally or knowingly “displays a firearm or other deadly weapon in a public place in a manner calculated to alarm.” TEX. PENAL CODE § 42.01(a)(8).¹ The portion of the statute at issue in this appeal is part that reads “in a manner calculated to alarm.” None of the words

¹ This statute has existed unaltered since the adoption of the Penal Code in 1974. Prior to that enactment, article 470 of 1911 Penal Code prohibited a person from going “into or near any public place, or into or near any private house, and [...] rudely display[ing] any pistol or other deadly weapon, in a manner calculated to disturb the inhabitants of such public place or private house [...].”

within that portion are defined by statute. The elements of the statute breakdown as follows:

1. The actor must intentionally or knowing display a firearm;
2. He must do so in a public place;
3. And he must do so in a manner calculated to alarm.

Id.; see also *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex. Crim. App. 2017) (citing *State v. Jarreau*, 512 S.W.3d 352 (Tex. Crim. App. 2017)) (first step of analyzing the sufficiency of a charging document is to identify the elements of the crime).

The court of appeals focused on the word “alarm,” concluding that the trial court correctly granted Ross’s motion to quash because “[c]onduct that [alarms] some people does not [alarm] others.” *Ross*, 531 S.W.3d at 883 (citing *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (alterations in original)). The court of appeals, therefore, held that the term “alarm” was “an undefined term of indeterminate or variable meaning.” *Ross*, 531 S.W.3d at 883–84 (quoting *State v. Mays*, 967 S.W.2d 404, 407 (Tex. Crim. App. 1998)). However, the statute does not require that a person actually be alarmed as a result of the defendant’s displaying of a firearm; it only requires proof that the actor *calculated* to cause alarm.

“Manner” is defined as a “way of doing something or the way in which a thing is done or happens.” THE AMERICAN HERITAGE DICTIONARY 763 (2nd ed.

1991). An act is “calculated” when it is “[u]ndertaken after careful estimation of the likely outcome,” THE AMERICAN HERITAGE DICTIONARY 228 (2nd ed. 1991), or is “planned or contrived to accomplish a purpose,” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 161 (10th ed. 1993). “Alarm” is defined as a “sudden fear caused by an apprehension or realization of danger,” THE AMERICAN HERITAGE DICTIONARY 91 (2nd ed. 1991), or a “sudden sharp apprehension and fear resulting from the perception of imminent danger,” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 26 (10th ed. 1993).

“Alarm,” as used in section 42.01(a)(8), also has a plain meaning supported by common sense—a person is “alarmed” by the display of a firearm when they fear the actor will discharge the firearm or threaten to discharge the firearm. Likewise, the display is a “a manner calculated to alarm” if the actor’s purpose in displaying the firearm is to place others in fear that the gun will be discharged or that he will threaten to discharge it.

In this respect, there is no discernable difference between the phrases “in a manner calculated to alarm” and “within intent to cause alarm” because if one is acting with “calculation,” he is invariably acting with “intent.” *Compare* TEX. PENAL CODE § 6.03(a) (“A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.”), *with*, THE

AMERICAN HERITAGE DICTIONARY 228 (2nd ed. 1991) (An act is “calculated” when it is “[u]ndertaken after careful estimation of the likely outcome.”), *and*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 161 (10th ed. 1993) (an act is “calculated” if it is “planned or contrived to accomplish a purpose.”).

The right to notice of a criminal accusation

The Sixth Amendment requires the prosecution to provide a defendant with sufficient notice “of the nature and cause of the accusation.” U.S. CONST. amend. VI. The Code of Criminal Procedure further requires the prosecution to plead “the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged.” TEX. CODE CRIM. PROC. art. 21.11. When the prosecution alleges that a crime was committed recklessly or with criminal negligence, it must “allege, with reasonable certainty, the act or acts relied upon to constitute recklessness or criminal negligence.” *Id.* at art. 21.15.

Under these rules, an information must be drafted with “sufficient clarity and detail to enable the defendant to anticipate the State’s evidence and prepare a proper defense to it.” *Garcia v. State*, 981 S.W.2d 683, 685 (Tex. Crim. App. 1998) (citing *Eastep v. State*, 941 S.W.2d 130, 132 (Tex. Crim. App. 1997)). In

most cases, an indictment will be sufficient if it tracks the text of the applicable statute. *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex. Crim. App. 2017).

This Court’s decisions also indicate that statutory text is insufficient when a statute defines “a term in such a way as to create several means of committing an offense.” *Solis v. State*, 787 S.W.2d 388, 390 (Tex. Crim. App. 1990). Likewise, the Court has required the State to provide more specific notice when a statute includes an “undefined term of indeterminate or variable meaning.” *State v. Mays*, 967 S.W.2d 404, 407 (Tex. Crim. App. 1998). Thus, a court evaluates an indictment by first identifying the elements of an offense and then determining whether the statutory language is completely descriptive. *Zuniga*, 512 S.W.3d at 907 (citing *Jarreau*, 512 S.W.3d at 354–55; *Mays*, 967 S.W.2d at 407).

This Court has on few occasions found statutory language to be insufficient. For example, in *Olurebi v. State*, 870 S.W.2d 58 (Tex. Crim. App. 1994), the Court concluded that the term “fictitious credit card” could be a credit card fraudulently issued by the wrong person or to a nonexistent person, and that an indictment should specify which type of conduct it alleged. *Id.* at 62. Similarly, in *Geter v. State*, 779 S.W.2d 403 (Tex. Crim. App. 1989), this Court held that a theft indictment must allege which statutory act or omission the State intends to prove to negate effective consent. *Id.* at 407. In *Swabado v. State*, 597 S.W.2d 361 (Tex. Crim. App. 1980), this Court required the State to specify which particular

government document a defendant tampered with when that defendant had prepared the same type of document for years. *Id.* 363–64. And in *State v. Moff*, 154 S.W.3d 599 (Tex. Crim. App. 2004), this Court concluded that the State needed to specify on which transactions it relied in an allegation of misapplication of fiduciary property spanning several years. *Id.* at 603–04.

On the other hand, the State does not need to allege how a DWI defendant was intoxicated. *State v. Barbernell*, 257 S.W.3d 248, 256 (Tex. Crim. App. 2008). Nor does it need to specify the particular acts relied upon to prove “unwanted sexual advances” within the context of sexual harassment. *State v. Edmond*, 933 S.W.2d 120, 130 (Tex. Crim. App. 1996). In a barratry case, the State is not required to allege how an accused lawyer solicits employment beyond the statutory definition of “solicit employment.” *Mays*, 967 S.W.2d at 409; *see* TEX. PENAL CODE § 38.01(11) (defining “solicit employment”).

The prohibition of vague and overly-broad statutes

Due process requires that a penal law be sufficiently clear to provide a person of ordinary intelligence adequate notice of what is prohibited. *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996) (citing *Grayned v. Rockford*, 408 U.S. 104, 108 (1972)). This type of notice requires greater specificity when a criminal statute penalizes speech. *Long, supra*, at 287–88 (citing *Grayned, supra*,

at 109). The protection of due process ensures a person has fair notice of what activities are prohibited by law so that he may conduct himself accordingly and avoid arrest or prosecution.

The difference between the right to notice under due process and the right to notice under the Sixth Amendment is distinct. When a statute is vague on its face, a person cannot be prosecuted under that statute regardless of the specificity of the charging document. A legislator’s failure to provide notice in this context is fatal to a criminal case and cannot be cured by any remedial action. Due process or the First Amendment is violated once a person is arrested or charged pursuant to the vague or overly broad statute. Obtaining a dismissal in court does not undo or erase the violation; it merely contains it to the arrest and accusation.

Conversely, when the prosecution fails to give proper notice through its charging document, it may be cured by amendment and the criminal case may proceed if the defendant can prepare his defense. A violation of this sort of notice does not occur unless a defendant is tried with an inadequate charging instrument. If the charging instrument is amended, no violation occurs.

Resolution of ground one: The prosecution should not be required to allege specific facts beyond “a manner calculated to alarm.”

In this case, the State’s information tracked the text of the statute. Additionally, the State alleged that Ross displayed his firearm on the 300 block of Ferris Avenue on or June 8, 2016 (C.R. at 7). This is all the notice to which Ross was entitled.

The court of appeals erred because it treated the word “alarm” as if it were a “required result.” *See* TEX. PENAL CODE § 1.07(22) (element of offense includes forbidden conduct, required culpability, and any required result). However, this offense does not require a result; it requires calculation. The display of the firearm in a public place is the “forbidden conduct” and the “manner calculated to alarm” is the “required culpability” (in addition to the general intent or knowledge required by subsection (a)). Contrary to the court of appeals’ analysis, section 42.01(a)(8) focuses on the intent and calculation of the actor, not the resulting condition of an observer.

Of course, the State will be required to present evidence above and beyond the simple fact that Ross displayed a firearm in a public place in order to convict him. The State could rely on a motive. Or the State could rely on circumstances of the public place and the physical way Ross manipulated the firearm. Or, perhaps, the State could rely on the testimony of an alarmed observer, and any prior

relationship between Ross and the observer. Ross can reasonably anticipate this evidence and prepare his defense because the information narrows his alleged conduct to a date and a particular street block.

In this respect, this case varies from other cases where there is more than one way to commit the offense, or where the offense consisted of numerous transactions. *See Geter*, 779 S.W.2d at 407 (State must provide notice which statutory act or omission the State intends to prove to negate effective consent); *Moff*, 154 S.W.3d at 603–04 (State must provide specific notice of particular transactions in misapplication of fiduciary property allegation spanning years). Here, the State alleged one discrete instance of display at the 300 block of Ferris Avenue on June 8, 2016 (C.R. at 7). So unlike a complex financial crime the preparation of Ross’s defense should be relatively straightforward. Also, unlike the offense of theft, there are no alternative methods to commit this crime because the actor must invariably display a firearm in a public place in a manner calculated to alarm.

Certainly, the actor’s calculation to alarm could manifest itself in a number of ways, just like an actor’s intent in the context of any number of other crimes. He could wave a gun in the air in the middle of a crowded plaza. Or he could discretely flash it to a particular individual whom he has a motive to harass. However, the manual manipulation of the firearm, the number or identity of

potentially alarmed observers, and any possible motive behind Ross’s display are evidentiary matters. *See Zuniga*, 512 S.W.3d at 908 (acknowledging lower court’s reasoning that identity of “thing” in tampering case is not a necessary element but may be relevant to actor’s intent).

And to the extent Ross desires notice of the State’s specific evidence, he may rely on discovery pursuant to article 39.14, disclosure of the State’s witnesses, and the independent investigation of trial counsel to prepare his defense. *See* TEX. CODE CRIM. PROC. art. 39.14(a) (defendant has right to discovery of most of State’s documentary evidence); *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993) (State must provide defendant its witnesses upon request).

Resolution of ground two: The court of appeals improperly relied on the due process vagueness doctrine.

Ross’s motion purports to be based on the Sixth Amendment right to notice and analogous state statutes (C.R. at 66–68). However, his argument in the trial court appears to be premised on the concern that a law abiding citizen carrying a firearm in public could be swept up by an arrest and prosecution under this statute (R.R. at 9–10). And on appeal, Ross cited to *Kramer* and *May* for the proposition that this Court and federal courts have previously invalidated statutes that vaguely used the term “alarm.” (Appellant’s Brief on Appeal at 9–10). Similarly, the court

of appeals acknowledged the Sixth Amendment as being the applicable law, but nevertheless, relied on *Coates*, *Kramer*, and *May* in its conclusion that the term “alarm” is vague. *Ross*, 531 S.W.3d at 883–84 (citing *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983), *subsequently vacated*, 716 S.W.2d 284 (5th Cir. 1983), *district court aff’d*, 723 F.2d 1164 (5th Cir. 1984); *May v. State*, 765 S.W.2d 438 (Tex. Crim. App. 1989)). These cases reflect a notion that a criminal law cannot depend on widely varying sensibilities among the public.

The lower court’s erred by conflating the notion of the statute’s potential vagueness with the sufficiency of the information. This is because whether a statute gives a person notice that his *potential* acts are unlawful *if committed* is not the same as giving “effective notice of the acts he allegedly [*already*] committed.” *Daniels v. State*, 754 S.W.3d 214, 220 (Tex. Crim. App. 1988) (alteration and emphasis added). Regardless of whether the statute is unconstitutionally vague, the information specifically informed Ross of the date and address of his alleged violation of a particular penal statute. This informs him of the charges against him, whether or not he knew his conduct was illegal on June 8, 2016 at the 300 block of Ferris Avenue.

The purpose of the information is to prevent the State from trying Ross by ambush. The State has achieved that purpose by alleging a discrete violation a

particular public place. The reasoning of the court of appeals does not address this purpose. Rather, it addresses a concern that Ross may not know who he was potentially alarming or whether his conduct was potentially alarming. This concern is irrelevant to the sufficiency of the information. The extent that Ross did (or did not) alarm any particular individual at the location and date of the alleged offense is only relevant to circumstantially show that he did (or did not) calculate to alarm by displaying his gun.

The State is aware of only one prior case where the Sixth Amendment and vagueness doctrine crossed paths. In *State v. Edmond*, 933 S.W.2d 120 (Tex. Crim. App. 1996), this Court held that an allegation of official oppression by mistreatment must also allege that the public official knew the mistreatment was unlawful. *Id.* at 127. The Court reasoned that it could not apply the “last antecedent” rule as proposed by the State because it would allow a public official to be convicted regardless of whether they knew the mistreatment was unlawful. *Id.* at 126. Relying on *May*, this Court determined that the State’s proposed interpretation of the statute would violate due process because “[c]onduct which may be deemed ‘mistreatment’ by some may not be viewed as such by others.” *Id.*

The conclusion in *Edmond* does not compel the same conclusion in this case. First, if the term “mistreatment” was not qualified by the official’s knowledge of unlawfulness, then *Edmond* suggests that the indictment would be subject to

dismissal under the vagueness doctrine *regardless* of its specificity. Second, the use of “mistreatment” in the official oppression statute is far broader than the use of “alarm” in the disorderly conduct statute because the “manner calculated to alarm” is tied to the simple act of displaying a firearm. Public officials, on the other hand, frequently assert authority over citizens in any number of contexts—collecting fines, issuing citations, assessing taxes and fees, and so forth. Also, because official oppression requires a result, the notion of varying sensibilities is appropriate in the context of that statute. *See* TEX. PENAL CODE § 39.03(a)(1) (requiring public servant to “*subject* another to mistreatment” (emphasis added)).

Resolution of ground three: Section 42.01(a)(8) is not vague because the gravamen of the statute is the actor’s calculation to alarm while engaging in a particular type of conduct.

The court of appeals conclusion that the term “alarm” is vague because “[c]onduct that [alarms] some people does not [alarm] others.” is wrong because it focuses on a result that is not required by the statute. *Ross*, 531 S.W.3d at 883 (citing *Coates*, 402 U.S. at 614 (alterations in original)). It is also wrong because it relies on case law interpreting statutes that implicate free speech as opposed to conduct. Because the statute prohibits a person from calculating to cause alarm

through conduct, as opposed to actually causing alarm through speech, it is not unconstitutionally vague.²

Rather than relying on *Kramer*, *May*, and *Coates*, the court of appeals should have relied on *Colten v. Kentucky*, 407 U.S. 104 (1972), and *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010). In *Kramer* and *May*, the statute required an individual to be alarmed as a result of the actor’s speech. *See Kramer*, 712 F.2d at 176 (quoting prior harassment statute); *May*, 765 S.W.2d at 439–40 (citing and quoting *Kramer* and the prior harassment statute). In *Coates*, the ordinance required an actor to not annoy a “person passing by.” *Coates*, 402 U.S. at 611–12. Section 42.01(a)(8), however, does not require a bystander to actually be alarmed because the statute turns on the actor’s intent and calculation.

In *Colten* and *Scott*, however, the Supreme Court and this Court observed that statutes using the term “alarm” are not unconstitutionally vague because they require a showing of intent. *See Colten*, 407 U.S. at 108–09, 110 (adopting the Kentucky court’s interpretation of the statute as constitutional because, in part, it

² A statute is facially unconstitutional when it is shown that it is unconstitutional “in all possible circumstances.” *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013) (citing *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 908–09 (Tex. Crim. App. 2011)). A statute can also be unconstitutional when applied to a particular case and typically after the parties have presented evidence at trial. *Lykos*, 330 S.W.3d at 910. Because there is no evidence in the record establishing how Ross displayed his gun in this particular case, this Court should only affirm the court of appeals conclusion that the term “alarm” is vague if it concludes that section 42.01(a)(8) is unconstitutional “in all possible circumstances.” *Rosseau*, 396 S.W.3d at 557 (citing *Lykos*, 330 S.W.3d at 908–09).

requires intent); *Scott*, 322 S.W.3d at 669–71 (noting that the harassment statute requires “specific intent” to inflict emotional distress on the listener). Judge Johnson’s concurrence in *Scott* rings true especially when applied to the present statute because there is no ambiguity in the disorderly conduct statute when “calculation” undergirds the offense. *See id.* at 671 (Johnson, J., concurring) (“There is no ambiguity of intent in the mind of the speaker, and intent undergirds the offense.”).

Furthermore, this statute prohibits certain conduct as opposed to speech. However vague the term “alarm” may be in the context of speech, it is well understood when the law prohibits a person from displaying a firearm in a manner calculated to alarm. A person may peaceably carry a holstered pistol or slung rifle in public all day long without committing a crime. But they may not display the firearm with the intent of causing fear among the public.

The court of appeals reasoning might be compelling had the legislature prohibited a person from “causing another to be alarmed by intentionally or knowingly displaying a firearm in public.” However, the legislature did not draft section 42.01(a)(8) with a result in mind. The statutes terms only prohibit the public display of a firearm when the actor does so with the calculation to alarm.

On appeal, Ross argued that section 42.01(a)(8) “condemns an entire ‘species of conduct,’ that is, the display of a firearm in a public place” (Appellant’s

Brief on Appeal at 12). This understanding of section 42.01(a)(8) would only be correct if the statute read, “A person commits an offense if he intentionally or knowingly displays a firearm in a public place.” But, the critical difference between the peaceable carrying of a gun and disorderly conduct is the actor’s calculation to alarm.

As an illustration, consider the following hypothetical: Footage from a security camera without audio shows Defendant walking up to the sales counter of a gun store with a holstered pistol. While at the counter, Defendant leans toward Sales Clerk and points to the gun. So far it does not appear that Defendant has done anything wrong. Perhaps he is asking Sales Clerk if he stocks ammunition for that type of pistol. However, Sales Clerk gives a statement to the police that he and Defendant have an ongoing feud and that Defendant did not inquire about purchasing merchandise, but that he spoke a verbal threat while pointing at his pistol. Now Defendant has likely crossed the line between lawful and unlawful conduct.³

The court of appeals reading of the statute does not affect the resolution of this hypothetical because, under the statute, it does not matter whether Store Clerk

³ This hypothetical is inspired by a case the undersigned counsel handled when he was first hired as a prosecutor. It does not bear any resemblance to the facts of the underlying case.

was actually alarmed. And Ross’s reading of the statute does not control because Defendant has done more than merely display his firearm in public.

Additionally, while federal and state law recognizes a citizen’s right to own and carry a firearm⁴; it does not allow him to use that weapon with an improper intent or for an improper purpose. Just like sections 42.01(a)(1) and 22.07(a)(5) do not abridge a citizen’s right to free speech, section 42.01(a)(8) does not on its face infringe on a citizen’s right to keep and bear arms. *See* TEX. PENAL CODE § 42.01(a)(1) (criminalizing “abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace”); *id.* at § 22.07(a)(5) (criminalizing threats with intent to place persons in fear of serious bodily injury).⁵

Finally, a person of ordinary intelligence understands the prohibition in section 42.01(a)(8). Firearms have a simple function—they discharge ammunition. *See* TEX. PENAL CODE § 46.01(3) (“‘Firearm’ means any device designed, made, or

⁴ Citizens enjoy the right to keep and bear arms under federal and state constitutions. In Texas, a person 21 years of age or older may openly carry a handgun in public so long as he has a license pursuant to chapter 411 of the Government Code and the handgun is carried in a holster. *See* TEX. GOV’T CODE § 411.172(a)(2); TEX. PENAL CODE § 46.035(a). Texas law does not generally prohibit the carrying of rifles or shotguns in public.

⁵ *See also Houston v Hill*, 483 U.S. 451, 462–63 n.10 (1987) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)) (noting that the wording of § 42.01(a)(1) is substantially similar to the language of the *Chaplinsky* holding); *Walker v. State*, 327 S.W.3d 790, 796–97 (Tex. App.—Fort Worth 2010, no pet.) (overruling an as-applied First Amendment challenge to a conviction under § 22.07(a)(1)).

adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.”). The term “alarm” in this section refers to a person’s fear or apprehension that the actor will discharge the firearm or threaten to discharge it. *See* THE AMERICAN HERITAGE DICTIONARY 91 (2nd ed. 1991) (“Alarm” is defined as a “sudden fear caused by an apprehension or realization of danger.”); MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 26 (19th ed. 1993) (“Alarm” is defined as a “sudden sharp apprehension and fear resulting from the perception of imminent danger.”). And by only applying to those displays where an actor *calculates* to alarm, section 42.01(a)(8) draws a clear line between lawful and criminal conduct.⁶

⁶ Ross can still complain that section 42.01(a)(8) is unconstitutionally vague as applied to his conduct. However, this question cannot be answered at this point because Ross only urged a motion to quash in a pretrial setting. Ross may still ask the trial court to dismiss his information on the basis of an as applied challenge after the State has presented its evidence and rested its case. *See Sanchez v. State*, 995 S.W.2d 677, 683 (Tex. Crim. App. 1999) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (when statute is not subject to a First Amendment challenge, the defendant must show how the statute was vague as to his conduct); *Lykos*, 330 S.W.3d at 910 (“An ‘as applied’ challenge is brought during or after a trial on the merits, for it is only then that the trial judge and reviewing courts have the particular facts and circumstances of the case needed to determine whether the statute or law has been applied in an unconstitutional manner.”)).

PRAYER FOR RELIEF

The Petitioner-State prays that this Court overrule the opinion of the court of appeals and reverse the trial court’s order granting Ross’s motion to quash.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nathan E. Morey, assistant district attorney for Bexar County, Texas, certify that a copy of the foregoing petition has been delivered by email to Mac Bozza and the Office of the State Prosecuting Attorney on March 12, 2018 in accordance with Rules 6.3(a), 9.5(b), and 68.11 of the Texas Rules of Appellate Procedure.

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CERTIFICATE OF COMPLIANCE

I, Nathan E. Morey, certify that, pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(D) and 9.4(i)(3), the above petition for discretionary review, excluding the cover page, identity of parties, table of contents, index of authorities, certificate of service, and certificate of compliance, contains less than 6,446 words according to the “word count” feature of Microsoft Office.

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